2002

The State of Utah, Plaintiff/Appellee, v. Jeff Ray Harris, Defendant/Appellant : Brief of Appellant

Utah Court of Appeals

J. Frederic Voros Jr.; Assistant Attorney General; Mark L. Shurtleff; Attorney General; Attorneys for Plaintiff.
Linda M. Jones; Stephen W. Howard; Attorneys for Defendant.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
v.	:	
	:	
JEFF RAY HARRIS,	:	Case No. 20020085-CA
	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Interlocutory Appeal from an Order Entered by the Honorable Leslie A. Lewis, Judge of the Third Judicial District Court in and for Salt Lake County, State of Utah.

LINDA M. JONES (5497)
STEPHEN W. HOWARD (8531)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Defendant/Appellant

J. FREDERIC VOROS, JR. (3340)
ASSISTANT ATTORNEY GENERAL
MARK L. SHURTLEFF (4666)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854

Attorneys for Plaintiff/Appellee

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Heber M. Wells Building
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854

Attorneys for Plaintiff/Appellee

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(d) (Supp. 2002), where this is an appeal from an interlocutory order entered in a court of record in a criminal case. Appellant Jeff Ray Harris petitioned for appeal from an interlocutory order of the trial court, entered on January 16, 2002. This Court granted the petition on April 29, 2002. (R. 178-79.) A copy of the trial court's January 16, 2002 Order is attached as Addendum A, and a copy of this Court's April 29, 2002 Order granting the petition for permission to appeal from an interlocutory order is attached as Addendum B.

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

The issue presented for review is as follows: Whether the trial court erred when it ruled that it had an incomplete record of the preliminary hearing, and also, whether it erred when it ordered further evidentiary proceedings for the preliminary hearing.

Standard of Review: The issue on review concerns an interpretation of a rule of law, and the bindover proceedings. This Court will interpret a rule of law without deference to the trial court. State v. Redd, 1999 UT 108, ¶¶10-11, 992 P.2d 986. It also will review a bindover issue as a question of law. State v. Clark, 2001 UT 9, ¶8, 20 P.3d 300.

PRESERVATION OF ARGUMENT

The issue is preserved in the record on appeal at 44-45; 63-108; 131-39; 192.

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following provisions will be determinative of the issue on appeal: Utah R. Crim. P. 7 (2002); Utah Code Ann. §§ 76-6-401; 76-6-403; 76-6-404; 76-6-405 (1999). The text of those provisions is contained in the attached Addendum C.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, Disposition in the Court Below.

In November 2000, the state filed an Information against Defendant Jeff Ray Harris (which was later amended), alleging one count of theft under Utah Code Ann. § 76-6-404 (1999). (R. 2-4; 31-33.) On April 12, 2001, the Honorable Denise Lindberg held a preliminary hearing in the matter (R. 29-30; 191), and bound Harris' case over for pretrial proceedings. (R. 29-30.) Thereafter, Harris filed a Motion to Quash, and the case was transferred to the Honorable Leslie Lewis. (R. 34-35; 44-45; 46-48; 50-53; 63-108; 131-39.)

On November 28, 2001, Judge Lewis considered the Motion to Quash and ruled on

the matter as follows: Judge Lewis indicated she was inclined to grant the Motion to Quash. However, she determined she had an incomplete record of the preliminary hearing. (R. 192:Tab 1:3-8; see infra note 1, herein.) Judge Lewis then entered an order for an evidentiary hearing to supplement the preliminary-hearing transcript. (Id.)

On December 19, the defense filed a Motion to Reconsider, urging Judge Lewis (i) to accept the record presented to her from the preliminary hearing, (ii) to strike that portion of the order providing for a supplemental evidentiary hearing, and (iii) to grant the Motion to Quash. (R. 150-54.) On January 16, 2002, the trial judge entered an order reiterating the earlier ruling (R. 163), and this Court granted Harris' petition for permission to appeal from an interlocutory order. (R. 178-79.)

STATEMENT OF FACTS

The state charged Harris with theft. At a preliminary hearing, the state presented the following evidence.

Kristine Praag testified that her family lived in a new home in Salt Lake County. (R. 191:1; see also R. 191:14 (testimony of Eric Praag).) She was involved in building the home and was approached by Harris to bid on cabinets for the home. (R. 191:1-2.) Mrs. Praag informed Harris that "we already had placed the contract with another company and [] we were probably going to go with them." (R. 191:2.) Harris asked if he could "at least" submit a bid, and Mrs. Praag agreed to let him. (R. 19:2.)

On May 3, 2000, Harris submitted a bid to install cabinets with cherry wood facing throughout the home for the price of $14,100. (R. 191:3.) The Praags agreed to the terms and entered into a contract with Harris. (R. 191:3, 14-15.) Harris requested half of the money up front, and according to Mrs. Praag, he was to complete the work by July 21, 2000. (R. 191:3.)

Later that month, on or about May 17, Mrs. Praag contacted Harris and expressed concern with his ability to do the work. (R. 191:4.) Harris told her not to worry. (R. 191:4-5.) Mrs. Praag testified that Harris "blew it off," and he assured her that the cabinets would be ready on schedule. Shortly thereafter, Harris told Mrs. Praag that the cabinets were "a third of the way done." (Id.)

On July 13, Mrs. Praag met with Harris and he admitted that he had not started the work on the cabinets. (R. 191:6.) When Mrs. Praag asked about the money they had given to Harris, he told them he spent it. (R. 191:6.) On July 14, the Praags terminated the contract with Harris, as set forth in a letter that stated in sum the following:

> The letter basically says that we felt at that time that Mr. Harris [had] stolen our money, and that he is to repay the money by July 21st. And if – at that time, Mr. Harris told us that he was not able to pay the money back by July 21st. And said, if you can just give me more time, I promise I will pay you back. And we said, okay, we are willing to work with you, you know, we just, we want you to do the right thing. And so we went ahead and scratched out on this original copy that he didn't need to pay us back by the 21st, that we would extend that until August 18th when the time to pay the other cabinet contractor came due. Because we knew we had 30 days at least to pay this other contractor that we had to –

(R. 191:7-8.)

At approximately that point in the proceedings, the recording equipment for the preliminary hearing malfunctioned. (See R. 191:8.) Thus, Mrs. Praag's remaining direct examination and cross examination were not recorded. As a result, defense counsel and the prosecutor stipulated that Mrs. Praag testified to the following additional facts at the preliminary hearing (hereinafter the "Stipulated Facts"):

> 1) Mr. Harris did not pay the Praags the $7,000 he had agreed to refund.
> 2) The contract entered into between the Praags and Mr. Harris provided for a $50 "late penalty" against Mr. Harris after July 21st if delay on the part of Mr. Harris caused delay in closing on the Praags' house.

(R. 61-62.) The recording equipment apparently became operational again.

Next, Kim Brown testified for the state. She was the general contractor / builder for the Praag home. (R. 191:8-9.) On May 10, 2000, Brown prepared a check in the amount of $7,000 for Harris. (R. 191:10-11.) Brown instructed Harris not to cash the check until there were funds in the account. On May 15, Brown gave Harris permission to deposit the check. (Id.) Brown testified that it is not out of the ordinary for a subcontractor to ask for a portion of the payment up front. (R. 191:13.)

Finally, Glenn Williams of Sandy City Police testified. Williams was contacted by the Praags because, "[t]hey were having cabinets built, had paid a substantial sum of money to a contractor to build those. When he did not fulfill that part of the contract, they were unable to get the money back, so they thought it was a theft." (R. 191:16.) Williams investigated the matter and contacted Harris on October 25. (R. 191:17.)

During the investigation, Williams asked if Harris had actually started work on the cabinets. Harris told him that he had started the work, but now, he was using some of the wood "on another job after [the Praags] fired him, and that once he had the other job finished, he would have the money to pay them back." (R. 191:18.)

Harris provided Williams with the names of two companies where he had purchased supplies for cabinets: "Hardwoods Inc. Utah" and "Intermountain Wood Products" in St. George. (R. 191:18.) Williams contacted those companies and obtained invoices from them. (R. 191:19-23.) He testified that the invoices failed to reflect an order for cherry wood. (R. 191:21-23.)

At the conclusion of the hearing, Judge Lindberg bound the case over for trial on the charge of theft. (R. 191:27.) Thereafter, counsel for the defense filed a Motion to Quash (R. 34-35; 44-45; 63-108; 131-39), and the case was transferred to Judge Lewis. Judge Lewis held a hearing on the Motion to Quash and stated she was inclined to grant the motion. The judge also stated she had an incomplete record of the preliminary hearing due to a malfunction in the recording equipment. (R. 192: Tab 1:3.)

When defense counsel informed the judge that the parties considered the record to be complete, the judge indicated she wanted to observe the demeanor of the witnesses herself, and she ordered an evidentiary hearing to supplement the preliminary-hearing transcript. The judge in essence rejected the "Stipulated Facts." (R. 192: Tab 1:3-5.)

Harris filed a Motion to Reconsider. The trial judge then issued an order that stated the following:

> Defendant's argument on the defendant's Motion to Quash the bindover was heard on November 28, 2001. The transcript of the Preliminary Hearing was provided, however, *it is incomplete due to technical difficulties during the hearing*. The State and the defendant have stipulated to the testimony which was absent from the transcript, and provided that stipulation to the Court. The Court is not satisfied that the evidence presented supports the bindover, and *will hear the live testimony which was not recorded in the transcript, along with any other live testimony the State would like to present. The Court will rely on the live testimony presented and the transcript from the Preliminary Hearing*. The case will not be remanded to Judge Lindberg.

(R. 163 (emphasis added).)[1]

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1 To the extent there is confusion as to whether Judge Lewis granted the Motion to Quash, the record reflects the following: Judge Lewis initially indicated that she was inclined to grant the Motion. (R. 192: Tab 1:3.) She also made reference to an incomplete record (id. (Judge Lewis stated the facts were deficient due to an incomplete record)), "omissions" in the record (R. 192: Tab 1:4), and "the [paucity] of the full record." (R. 192: Tab 1:5.) Thus, it seems Judge Lewis was inclined to grant the Motion because she believed she did not have a complete record of the preliminary hearing.

After Judge Lewis made her initial ruling, counsel for Harris filed a Motion to Reconsider, and advised the court that the record for the preliminary hearing was complete. (R. 150-55) Counsel then asked the court to "rule on the Motion to Quash based solely on the evidence before the court at this point." (R. 154.) The state responded by also asking the trial court to rule on the Motion to Quash. (R. 166-67 ("the record presented is [as] complete as possible").)

Judge Lewis then entered a subsequent order, dated January 16, 2002. That order did not indicate whether the court would grant the Motion to Quash. Rather, the court ordered supplemental proceedings, and it ruled it would rely on the "live testimony" and the preliminary hearing transcript in determining the matter. (R. 163.) In essence, the court was rejecting the "Stipulated Facts" as prepared by counsel. Harris is appealing from that ruling.

Harris requested that this Court review the ruling of the trial court. (Petition for Permission to Appeal from an Interlocutory Order, dated February 1, 2002.) This Court granted Harris' request. (See Addendum B, hereto.) Additional facts related to this appeal are set forth below.

SUMMARY OF THE ARGUMENT

In considering a motion to quash the bindover, the trial court in this case indicated it was inclined to grant the motion; it also determined the record for the preliminary hearing was incomplete. The trial court in essence rejected the "Stipulated Facts" of record, and then ordered another evidentiary hearing to supplement the original proceedings. The trial court specified that the state would be able to present any evidence it would like at the supplemental hearing, and the court would make credibility determinations with respect to the witnesses and the evidence. The trial court's ruling was in error for several reasons.

First, the trial court had a complete record of the preliminary hearing: it was not at liberty to reject the "Stipulated Facts." The Utah Supreme Court has specified that a court is bound by party stipulations unless specified conditions have been met. The specified conditions were not in issue here. The trial court should have accepted the "Stipulated Facts" as part of the complete record, and ruled on the Motion to Quash.

Next, according to Utah law, in considering a motion to quash, a trial court may not make credibility determinations with respect to the evidence. The court may only

assess whether a case was properly bound over to the trial court for further proceedings. In that regard, the trial court's order here to supplement the proceedings was improper.

Also, the trial court's order for a supplemental evidentiary hearing served to circumvent the standards set forth in State v. Brickey, 714 P.2d 644, 647 (Utah 1986). According to Brickey, the state may be entitled to further proceedings at the preliminary-hearing stage if the prosecutor is able to show that "new or previously unavailable evidence has surfaced or that other good cause justifies refiling." Id. Due process considerations and fundamental fairness preclude further proceedings unless that showing has been made. In this case, the state failed to make the requisite showing. Thus, it was not entitled to a supplemental evidentiary hearing.

Finally, this Court should remand the case in order that the trial court may assess the evidence set forth in the preliminary hearing transcript together with the "Stipulated Facts" to determine whether probable cause existed for the bindover. In the event this Court determines to make that assessment itself, it should find that the evidence here is insufficient. The state failed to establish that Harris obtained "unauthorized control" over the Praags' funds for "theft," and it failed to establish deception. Thus, the information should be dismissed.

ARGUMENT

THE DISTRICT COURT JUDGE HAD A COMPLETE RECORD OF THE PRELIMINARY HEARING. IT ERRED WHEN IT REJECTED THE "STIPULATED FACTS," AND WHEN IT ENTERED AN ORDER TO SUPPLEMENT THE PRELIMINARY-HEARING TRANSCRIPT WITH ANY TESTIMONY THE STATE WISHED TO PRESENT.

A. THE RECORD OF THE PRELIMINARY HEARING WAS COMPLETE.

1. The Court Was Bound by the "Stipulated Facts."

The Utah Supreme Court has ruled that "[o]rdinarily, courts are bound by stipulations between parties." First of Denver Mortgage Investors v. C.N. Zundel & Assocs., 600 P.2d 521, 527 (Utah 1979).

An exception to that rule is when the parties have stipulated to an interpretation of the law. Courts will not be bound by such an interpretation. Adkins v. Uncle Bart's, Inc., 2000 UT 14, ¶¶34-40, 1 P.3d 528 (ruling that court is not bound by stipulations between parties when points of law requiring judicial determinations are involved; here, court could not be bound by parties' stipulation that Dramshop Act provided a cause of action for wrongful death), cert. denied, 531 U.S. 1011 (2000); Mooney v. GR and Assoc., 746 P.2d 1174, 1178 (Utah Ct. App. 1987) (recognizing parties cannot stipulate to points of law).

Also, a court may set aside a stipulation only when the following conditions have been met: a party has requested relief from the stipulation by filing a timely motion with the court showing justifiable cause for the relief, or showing that the stipulation was

entered into inadvertently. If the court grants the relief, it must state its basis for doing so. See Yeargin, Inc. v. Auditing Division of the Utah State Tax Commission, 2001 UT 11, ¶21, 20 P.3d 287. Where the standard for withdrawing a stipulation is not met, the trial court is bound by the stipulation. It is not at liberty to reject it.

In Dove v. Cude, 710 P.2d 170 (Utah 1985), the plaintiff obtained a default judgment against defendants after defendants failed to respond to plaintiff's defective complaint and summons. Defendants sought to have the judgment set aside, but were unsuccessful. When the defendants indicated an intent to appeal the trial court's ruling, the plaintiff filed a stipulation "agreeing to have the default judgment set aside and the case set for trial." Id. at 171. Five months after the stipulation was filed, the plaintiff moved to withdraw it. The trial court granted that request over the objection of the defendants. Id. The Utah Supreme Court reversed the trial court's ruling and reiterated that courts are bound by stipulations between parties. Id. Also, parties are bound by such stipulations unless they obtain timely and proper relief from the court. Id. at 171.

The rule of law as it relates to party stipulations applies here, as further explained below. See infra, subpart B., below.

2. The Standards and Rules Applicable to Preliminary Hearings.

Rule 7, Utah Rules of Criminal Procedure, provides in relevant part the following:

> (g)(1) If a defendant is charged with a felony, the defendant shall be advised of the right to a preliminary examination. If the defendant waives the right to a preliminary examination, and the prosecuting attorney consents, the magistrate

shall order the defendant bound over to answer in the district court.

(2) If the defendant does not waive a preliminary examination, the magistrate shall schedule the preliminary examination. The examination shall be held within a reasonable time, but not later than ten days if the defendant is in custody for the offense charged and not later than 30 days if the defendant is not in custody. These time periods may be extended by the magistrate for good cause shown. A preliminary examination may not be held if the defendant is indicted.

(h)(1) Unless otherwise provided, a preliminary examination shall be held under the rules and laws applicable to criminal cases tried before a court. The state has the burden of proof and shall proceed first with its case. At the conclusion of the state's case, the defendant may testify under oath, call witnesses, and present evidence. The defendant may also cross-examine adverse witnesses.

(2) If from the evidence a magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate shall order, in writing, that the defendant be bound over to answer in the district court. The findings of probable cause may be based on hearsay in whole or in part. Objections to evidence on the ground that it was acquired by unlawful means are not properly raised at the preliminary examination.

(3) ***If the magistrate does not find probable cause to believe that the crime charged has been committed or that the defendant committed it, the magistrate shall dismiss the information and discharge the defendant. The magistrate may enter findings of fact, conclusions of law, and an order of dismissal. The dismissal and discharge do not preclude the state from instituting a subsequent prosecution for the same offense.***

(i) At a preliminary examination, the magistrate, upon request of either party, may exclude witnesses from the courtroom and may require witnesses not to converse with each other until the preliminary examination is concluded. On the request of either party, the magistrate may order all spectators to be excluded from the courtroom.

(j)(1) If the magistrate orders the defendant bound over to the district court, the magistrate shall execute in writing a bind-over order and shall transmit to the clerk of the district court all pleadings in and records made of the proceedings before the magistrate, including exhibits, recordings, and any typewritten transcript.

Utah R. Crim. P. 7 (2002) (emphasis added).

With respect to the "magistrate's role" in a preliminary hearing, the Utah Supreme Court has stated the following:

> "[T]he magistrate's role in evaluating th[e] evidence is limited.... '[T]he magistrate should view the evidence in a light most favorable to the prosecution and resolve all inferences in favor of the prosecution.' *State v. Talbot*, 972 P.2d 435, 438 (Utah 1998) (quoting *State v. Pledger,* 896 P.2d 1226, 1229 (Utah 1995))."

State v. Hawatmeh, 2001 UT 51, ¶3, 26 P.3d 223. That is, "'[w]hen faced with conflicting evidence, the magistrate may not sift or weigh the evidence . . . but must leave those tasks "to the fact finder at trial."'" State v. Clark, 2001 UT 9, ¶10, 20 P.3d 300 (cites omitted).

Also, "the magistrate's evaluation of credibility at a preliminary hearing is limited to determining that '"evidence is wholly lacking and incapable of reasonable inference to prove some issue which supports the [prosecution's] claim."'" Talbot, 972 P.2d at 438 (quoting Pledger, 896 P.2d at 1229; Cruz v. Montoya, 660 P.2d 723, 729 (Utah 1983)). The trial court may not weigh the evidence and the court is precluded from evaluating the weight of otherwise credible evidence. Talbot, 972 P.2d at 438.

"Additionally, '"[u]nless the evidence is wholly lacking and incapable of reasonable inference to prove some issue which supports the [prosecution's] claim," the magistrate should bind the defendant over for trial.'" Talbot, 972 P.2d at 438 (cites omitted). To be clear, the magistrate's role in the process "'while limited, is not that of a

rubber stamp for the prosecution . . . Even with this limited role, the magistrate must attempt to ensure that all "groundless and improvident prosecutions" are ferreted out no later than the preliminary hearing.'" Clark, 2001 UT 9, ¶10 (cites omitted).

The Utah Supreme Court also has recognized the inherent authority of a district court judge to assess bindover proceedings, via a motion to quash. The purpose of the motion to quash is to allow the district court judge to determine whether jurisdiction has been properly invoked.

> A magistrate issues a bindover order after a preliminary hearing upon finding that there is probable cause to believe the defendant has committed the crime charged in the information. *See* Utah R.Crim.P. 7(8)(b). By the bindover order, the magistrate requires the defendant "to answer [the information] in the district court." *Id.* The information is then transferred to the district court, permitting that court to take original jurisdiction of the matter. At that point, the district court has the inherent authority and the obligation to determine whether its original jurisdiction has been properly invoked. In doing so, the district court need show no deference to the magistrate's legal conclusion, implicit in the bindover order, that the matter may proceed to trial in district court, but may conduct its own review of the order.

State v. Humphrey, 823 P.2d 464, 465-66 (Utah 1991) (note omitted); see also id. at 466 n.3. In this case, the standards identified above apply. See infra, subpoint B., below.

Next, with respect to the state's role in a preliminary hearing, the Utah Supreme Court has stated the following:

> At a preliminary hearing, "the State must show 'probable cause' ... by 'present[ing] sufficient evidence to establish that "the crime charged has been committed and that the defendant has committed it." ' " *Clark*, 2001 UT 9 at ¶¶10-11, 20 P.3d 300 (clarifying the question of what constitutes sufficient evidence to support a finding of probable cause at a preliminary hearing) (quoting *State v. Pledger,* 896 P.2d 1226, 1229 (Utah 1995) (quoting Utah R.Crim. P. 7(h)(2))). To prevail at

this stage, the prosecution must:

> produce believable evidence of all the elements of the crime charged, just as it would have to do to survive a motion for a directed verdict. However, unlike a motion for a directed verdict, this evidence need not be capable of supporting a finding of guilt beyond a reasonable doubt. Instead, ... the quantum of evidence necessary to support a bindover is less than that necessary to survive a directed verdict motion.

Clark, 2001 UT 9 at ¶¶ 15-16, 20 P.3d 300 (internal quotations and citations omitted).

> Recently, in *State v. Clark,* we specified that at the preliminary hearing stage, the magistrate should apply the same probable cause standard as that applied at the arrest warrant stage. *See id.* at ¶ 16. Under this standard, "the prosecution must present sufficient evidence to support a *reasonable belief* that an offense has been committed and that the defendant committed it." *Id.* [citing *State v. Anderson,* 612 P.2d 778, 783-84 (Utah 1980)] (emphasis added).

Hawatmeh, 2001 UT 51, ¶¶14-15 (footnote omitted). Those standards also apply here, as further explained below. See infra, subpart B., below.

B. THE TRIAL COURT ESSENTIALLY REJECTED THE "STIPULATED FACTS." THAT WAS IMPROPER. IN ADDITION, THE TRIAL COURT IMPROPERLY RULED THAT THE PRELIMINARY HEARING SHOULD BE SUPPLEMENTED WITH ADDITIONAL EVIDENCE.

In this case, the state charged Harris with theft. (R. 2-4; 31-33.) After the preliminary hearing, Judge Lindberg found probable cause to bind the matter over for trial. (R. 29-30.) The defense then prepared a Motion to Quash for filing with the district court judge. (R. 34-35; 63-108.) In connection with preparing that motion, the parties learned that the recording equipment for the preliminary hearing malfunctioned during Mrs. Praag's testimony. The prosecutor and defense counsel prepared a set of "Stipulated Facts" for the court to constitute a complete record of the evidence presented at the

preliminary hearing. (R. 61-62.)

The defense presented the Motion to Quash to Judge Lewis. After argument on the matter, Judge Lewis stated she was inclined to grant the motion. However, she believed she had an incomplete record of the preliminary hearing. (R. 192: Tab1:3, 5.) Judge Lewis then ordered a supplemental evidentiary hearing in the case; she claimed she needed to assess the demeanor of the witnesses as they testified. (R. 192: Tab 1:4.) Judge Lewis essentially rejected the "Stipulated Facts" as part of the record. That ruling was incorrect for several reasons.

First, Judge Lewis had a complete record of the preliminary hearing. She was not at liberty to reject the "Stipulated Facts." "Ordinarily, courts are bound by stipulations between parties." First of Denver Mtg. Investors, 600 P.2d at 527. A court may not set aside a stipulation unless a proper motion is made by one of the parties showing inadvertence or justifiable cause. See Yeargin, Inc., 2001 UT 11, ¶21.

In this case, the "Stipulated Facts" were signed by both the prosecutor and counsel for the defendant. "It is unlikely that a stipulation signed by counsel and filed with the court was entered into inadvertently." Dove, 710 P.2d at 171. Thus, the "Stipulated Facts" signed by both attorneys was binding on the court and the parties. See id. The "Stipulated Facts" completed the record for the preliminary hearing. Where Judge Lewis had a complete record, she should have ruled on the Motion to Quash.

Second, Judge Lewis ordered the supplemental hearing so that she could assess

the credibility and demeanor of the witnesses. That was improper. The bindover standard requires the judge to consider the facts and inferences presented at the preliminary hearing in the light most favorable to the state. Hawatmeh, 2001 UT 51, ¶3. The judge may not make credibility determinations since those determinations must be left "'to the fact finder at trial.'" Clark, 2001 UT 9, ¶10 (cite omitted). Judge Lewis was not required to make credibility determinations. Her role was limited to assessing the evidence in the light most favorable to the prosecution. Hawatmeh, 2001 UT 51, ¶3.

Also, a motion to quash raises a question of jurisdiction in the district court. In considering a motion to quash, the district court judge has the authority "and the obligation to determine whether its original jurisdiction has been properly invoked." Humphrey, 823 P.2d at 465-66. Such a determination concerns a review of the preliminary hearing proceedings. Id. at 466. Logically, if the evidence fails to support the bindover, the district court lacks jurisdiction to proceed with the matter and must dismiss the case.

In that regard, Judge Lewis' authority in this case encompassed review only of the procedure by which the matter came before the district court. Humphrey, 823 P.2d at 466. If the evidence failed to support the bindover, the district court lacked jurisdiction to proceed with the case. If the district court's jurisdiction was not properly invoked, the district court would not have jurisdiction to take any additional evidence that the state wished to present in supplemental proceedings. Thus, the trial court's order for

supplemental proceedings was in error.

Third, the law does not allow for supplemental evidentiary proceedings as ordered in this case. Specifically, Rule 7(h)(1) requires preliminary hearings to be held "under the rules and laws applicable to criminal cases tried before a court. The state has the burden of proof and shall proceed first with its case." Utah R. Crim. P. 7(h)(1) (2002). At the conclusion of the state's case, the defendant may testify or present witnesses. Id. The rules do not provide for additional, supplemental evidentiary proceedings.

Thereafter, if from the evidence the judge finds probable cause, the case shall proceed to trial. Utah R. Crim. P. 7(h)(2) (2002). If the judge does not find probable cause "to believe that the crime charged has been committed or that the defendant committed it, the magistrate," or the trial judge reviewing the motion to quash (Humphrey, 823 P.2d at 465-466), "*shall* dismiss the information and discharge the defendant." Utah R. Crim. P. 7(h)(3) (emphasis added). The language of Rule 7(h)(3) is mandatory. The rules do not provide for supplemental evidentiary proceedings.

Once the case is dismissed, the prosecutor has the discretion to institute a "subsequent prosecution" for the same offense. Utah R. Crim. P. 7(h)(3). However, the prosecutor's discretion is limited. The prosecutor may not institute a subsequent prosecution unless s/he is able to "show that new or previously unavailable evidence has surfaced or that other good cause justifies refiling." Brickey, 714 P.2d at 647.

The "Brickey" standard provides protection against prosecutorial abuse and it

ensures due process. "[D]ue process considerations prohibit a prosecutor from refiling criminal charges earlier dismissed for insufficient evidence" unless the prosecutor can justify the filing and the additional proceedings under the "Brickey" standard. Id.; see also State v. Morgan, 2001 UT 87, ¶¶14-15, 34 P.3d 767 (if the state intentionally withholds evidence, that is not good cause for a new preliminary hearing); State v. Redd, 2001 UT 113, ¶¶16-17, 20, 37 P.3d 1160 (where the state fails to present "a scintilla of evidence" on one of the elements of the crime, refiling in that instance presumptively violates the due process rights of defendant).

In the instant case, Judge Lewis ordered a supplemental evidentiary hearing that allowed the state to present whatever evidence it wished. (R. 192: Tab 1:3-4; 163 (ruling that the state may present any live testimony it "would like to present").) Such an order without limitation is unlawful. See Redd, 2001 UT 113, ¶13 (due process precludes additional proceedings "without limitation" in the preliminary-hearing stage). Here, the trial court did not limit the supplemental evidentiary hearing to evidence that was presented at the original proceedings but not recorded. In addition, the judge did not limit the supplemental evidentiary hearing to permit the state to present previously unavailable evidence, as permitted under Brickey, 714 P.2d at 647.

In this case, the judge effectively circumvented the "Brickey" standard by entering an order to allow the prosecutor to present any additional evidence s/he wished in the matter. Such an order disregards the checks and balances on the system that ensure

fundamental fairness and due process. See Morgan, 2001 UT 87, ¶¶11-13 (the "Brickey" standard ensures the proper balance, where the state may present new or additional evidence in connection with the preliminary hearing only in limited circumstances). Considerations of fundamental fairness preclude providing the prosecutor with such unbridled discretion in subsequent proceedings at the preliminary-hearing stage. See Brickey, 714 P.2d at 647. In that regard, Judge Lewis' ruling in this case violated Brickey.

The trial court's order of January 16, 2002, in part was improper. The trial court ruled the preliminary-hearing record was "incomplete" and it ordered an evidentiary hearing to supplement the preliminary-hearing transcript. That was error. The trial court had a complete record on the matter. The trial court should have ruled on the Motion to Quash based on the preliminary hearing transcript and the "Stipulated Facts."

Harris respectfully requests that this Court enter an order vacating that portion of the trial court's order providing for the supplemental, evidentiary proceedings. Also, Harris respectfully requests that this Court direct the trial court to rule on the Motion to Quash based on the transcript of the existing preliminary hearing and the "Stipulated Facts." In the event the trial court determines on the record before it that the evidence is sufficient for a bindover, it may proceed to trial with the matter. If there is insufficient evidence before the court to support the bindover order, the trial court must dismiss the case. Utah R. Crim. P. 7(h)(3). If the case is dismissed, the prosecutor may have the opportunity to refile the charges under the proper "Brickey" standard and the rules.

C. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE BINDOVER.

The trial court should decide the Motion to Quash in the first instance on the "Stipulated Facts" and the preliminary hearing transcript, as set forth above. "[I]t is always proper for a trial court, as a threshold jurisdictional matter, to consider whether it has jurisdiction over a criminal defendant." Humphrey, 823 P.2d at 468. This Court simply should reverse the trial court's order as requested above, and remand this case "to the district court[] for consideration of the merits of the motion[] to quash." Id.

In the event this Court considers it necessary to address the merits of the Motion to Quash, it should find that the state's evidence here was insufficient to support the bindover, as further explained below.

1. Utah's Theft Provisions.

The state charged Harris with theft. The Utah Code defines the crime of theft as follows: "A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." Utah Code Ann. § 76-6-404 (1999). The Code also defines relevant phrases as follow:

> (3) "Purpose to deprive" means to have the conscious object:
>
> (a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or
>
> (b) To restore the property only upon payment of a reward or other compensation; or

> (c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.
>
> (4) "Obtain or exercise unauthorized control" means, but is not necessarily limited to, conduct heretofore defined or known as common-law larceny by trespassory taking, larceny by conversion, larceny by bailee, and embezzlement.

Utah Code Ann. § 76-6-401 (1973 & 1999); see also State v. Shonka, 279 P.2d 711, 713 (Utah 1955) (identifying elements of larceny as follows: "(1) taking and (2) carrying away of the (3) personal property [] (4) of another (5) by trespass without the owner's consent (6) with the intent to steal"); State v. Aures, 127 P.2d 872 (Utah 1942) (identifying embezzlement as fraudulent conversion of property by one who is entrusted as "'bailee, tenant or lodger, or with any power of attorney,'" where such person converted property to his own use); Black's Law Dictionary 540 (7th ed. 1999) (defining common law embezzlement as fraudulent taking of property by one who is a fiduciary).

The Utah consolidated theft statute also is relevant here. It states the following:

> Conduct denominated theft in this part constitutes a single offense embracing the separate offenses such as those heretofore known as larceny, larceny by trick, larceny by bailees, embezzlement, false pretense, extortion, blackmail, receiving stolen property. An accusation of theft may be supported by evidence that it was committed in any manner specified in Sections 76-6-404 through 76- 6-410, subject to the power of the court to ensure a fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

Utah Code Ann. § 76-6-403 (1999).

In construing the various theft provisions set forth above, this Court has recognized that "the consolidated theft statute is designed to 'eliminate[] the distinctions

and technicalities previously existing, recognizing one crime of theft and incorporating therein all crimes involving the taking or obtaining of personal property without force.'" State v. Bush, 2001 UT App 10, ¶12, 47 P.3d 69 (citing State v. Taylor, 570 P.2d 697, 698 (Utah 1977)).

This Court also has stated that the purpose of the consolidated theft statute "is not to allow the State to avoid the substantive safeguards contained in Rule 4 [for sufficient pleading by information]. Rather, the consolidated theft statute is designed to prevent a defendant from escaping an otherwise valid theft charge on a mere technicality in the pleadings." Bush, 2001 UT App 10, ¶15.

To that end, the state may allege general theft and then refine its theory for a specific variation of theft if it turns out that the evidence supports such a variation. See id. at ¶¶15-16. This Court stated the following with regard to the general theft provision and the alternative theories:

> If it turns out, as is the case here, that the State's initial theory of theft is not supported by the evidence and a different theory is warranted, the State should not be foreclosed from changing the theory of theft simply because it attempted to provide more information in the initial charge. The purpose of the consolidated theft statute is to allow the State to change its theory of the crime when it later determines the evidence supports a different theory. In so holding, however, we reiterate that allowing the State to amend the charge is always subject to a defendant's right to fair notice.

Bush, 2001 UT App 10, ¶23.

The state's ability to amend the information to reflect a specific or an alternative

theft theory is subject to defendant's right to know the nature of the accusation so that defendant is able to prepare a defense. Id. at ¶¶16, 23-24. That means, if the state alleges general theft and has not indicated at the preliminary hearing its intent to pursue a specific theory, the defendant may not be on notice of the nature of the accusation against him to allow him the "opportunity to assail the sufficiency of the complaint." Id. at ¶27. If the state later discloses its specific theory for the offense, the defendant may be entitled to a new preliminary hearing in order to engage in a meaningful cross-examination as it relates to the state's specific theory. Bush, 2001 UT 10, ¶28 ("defendant is entitled to the opportunity to cross-examine the State's witnesses [anew] with respect to the new [amended] charge").

In this case, the state charged Harris with general theft under Section 76-6-404. (R. 2-4.) During the preliminary hearing, the state did not suggest that it would amend the charge to allege any different or specific theory of the crime under the law. (R. 191.) Indeed, the prosecutor argued that "we have shown probable cause to believe that the defendant has committed the crime of theft. A person commits [theft] under the Code of the crime of theft if he obtains or exercises unauthorized control of the property of another with the purpose to deprive him thereof." (R. 191:24-25.) The state then argued that the evidence supported general theft. (Id.)

Counsel for Harris disagreed with the state. "It's not unauthorized control. It's not theft." (R. 191:26.) Defense counsel then claimed that the state arguably may have a

stronger case for the specific variation of "theft by deception." (R. 191:26.) Yet, as defense counsel argued at the preliminary hearing, the state did not charge that specific variation. (Id.) In addition, the evidence presented in this matter would not support a charge either for general theft or the specific variation of theft by deception. (See R. 191, generally; see also 192: Tab 1:2 (defense counsel consistently argued that the state failed to present sufficient evidence to support a crime).)

Thereafter, in papers filed with Judge Lewis, the state argued the evidence supported the specific variation of "theft by deception." (R. 117.) Under the Code, the crime of theft by deception is defined as follows:

> (1) A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof.
> (2) Theft by deception does not occur, however, when there is only falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares or worth in communications addressed to the public or to a class or group.

Utah Code Ann. § 76-6-405 (1999). Significantly, the state did not seek to have the information amended to support that alternative theory. See Bush, 2001 UT App 10, ¶¶27-29 (state's request to amend information is subject to defendant's right to fair notice, which may include a new preliminary hearing).

Even if the state had requested an amendment for theft by deception, as further set forth below, the state's evidence in this case was insufficient to support either the general crime of "theft," or the specific variation of "theft by deception."

2. The Evidence Failed to Support Either Theft or Theft by Deception.

As stated above, the general crime of "theft" and the more specific crime of "theft by deception," both require the state to establish the following elements at the preliminary hearing: that the defendant [1] obtained or exercised control, [2] over the property of another, [3] with a purpose to deprive him thereof. Utah Code Ann. §§ 76-6-404 (theft also requires proof of "unauthorized control"); 76-6-405 (theft by deception also requires proof of deception). In this case, the state failed to show that Harris exercised control "over the property of another with the purpose to deprive him thereof." The state also failed to establish "unauthorized control" for theft; and "deception" for the specific variation.

Specifically, the evidence considered in the light most favorable to the prosecution supports that the Praags and Harris entered into a contract, wherein Harris agreed to build cabinets with "melamine and cherry wood interiors" and other features for installation in the Praags' home, and the Praags agreed to pay the amount of $14,100. The contract provided that the Praags were to pay 50% of the price at the time of the contract, 25% of the price on delivery of the cabinets, and the balance upon completion of the project. (See R. 191:14-15, Exhibit 1 (Contract, dated May 3, 2000).) Harris and the Praags signed the contract. Although the "contract" did not specify the date of performance (see id.), Mrs. Praag testified that the work was to be completed by July 21, 2000. (R. 191:3.) The contract also provided that Harris would pay a "$50 late penalty after 21" if

Harris was late in performing on the contract and it delayed in the closing on the Praags' home. (R. 191:14-15, Exhibit 1; 61-62 ("Stipulated Facts").)

Thereafter, the Praags did not provide Harris with the down payment until May 10, 2000. On that date, the Praags' general contractor prepared a check made payable to Harris in the amount of $7,000. (R. 191:10.) The general contractor asked Harris to hold on to the check until "the actual funds were transferred" to the Praags' account, which was on May 15. (R. 191:11.) Harris deposited the check on May 15. (Id.)

On or about May 17, Mrs. Praag began to have concerns about Harris' ability to perform on the contract. (R. 191:4, 10 (the Praags' contractor gave a check to Harris on May 10; a week later the Praags had concerns).) The Praags contacted Harris and he assured them that he would do the work. (R. 191:4-5.) This did not allay Mrs. Praags' concerns. (R. 191:5.) Harris also said he was one-third of the way finished. (Id.)

On July 13, before Harris was due to perform on the contract, the Praags contacted him again. This time, Harris admitted "that he actually really hadn't started our cabinets." He also admitted that he had spent the $7,000 down payment. (R. 191:6.)

At that point, the Praags decided to terminate the contract with Harris. They had a letter prepared demanding that Harris "repay" the down payment by July 21. (R. 191:7, 11-12; Exhibit 2.) Harris informed the Praags that he was unable to pay the money by that date. (R. 191:7.) He requested more time, and the *Praags* "extend[ed] that until August 18th." (R. 191:7.) Harris signed the Praags' letter terminating the contract. (R.

191:7, 11-12; Exhibit 2.) According to the "Stipulated Facts," Harris "did not pay the Praags the $7,000 he had agreed to refund." (R. 61.)

The facts fail to establish the general crime of theft. The evidence fails to support that Harris obtained or exercised *unauthorized* control over the down payment. By way of explanation, the May 3 contract required Harris to build and install cabinets for the Praags' home and it required the Praags to pay 50% of the contract price. The Praags' contractor made the down payment on May 10, and then asked Harris not to deposit the funds until she gave him *authorization*. Harris complied with the request. He did not deposit the check until he was specifically authorized to do so. On May 15, the contractor gave Harris permission to cash the check. The evidence is undisputed. It supports that Harris was authorized to cash the check. He obtained authorized control over the funds.

Next, the contract did not specify how Harris was required to use the funds. It did not obligate Harris to use the funds only on materials for and services provided in connection with the Praags' cabinets. (See R. 191:14-15, Exhibit 1.) Likewise, the Praags did not testify that they had any expectation that the funds would be used in such an exclusive fashion. (See R. 191, in general.)

Indeed, in this case, the contract reflects no such expectation on the Praags' part. While the Praags agreed to provide a down payment (see R. 191:14-15, Exhibit 1), Harris then was required to build and deliver all cabinets before the Praags would be required to

pay anything further. (Id.) Harris would be finally paid for the project after he completed installation of the cabinets. (Id.) The arrangement recognized that Harris used money as it came in for various projects. Also, in this case, the state failed to show that the Praags placed any restrictions or limitations on the use of the down payment. Thus, the state failed to present any evidence to support that Harris exercised unauthorized control over the property of another. See State v. Burton, 800 P.2d 817, 819 (Utah Ct. App. 1990) (since the terms of the contract did not create an express duty as to how defendant should use the funds, the state could not establish theft).

In this case, the state was unable to show that Harris "obtain[ed] or exercis[ed] unauthorized control" over the down payment. The evidence failed to support theft. Utah Code Ann. § 76-6-404.

Next, under the specific variation of theft by deception, the evidence considered in the light most favorable to the prosecution fails to establish any deception on Harris' part. The Utah Code specifies that "failure to perform the promise in issue without other evidence of intent or knowledge *is not sufficient proof* that the actor did not intend to perform or knew the promise would not be performed." Utah Code Ann. § 76-6-401(5)(e) (1999) (emphasis added). That is, the state must establish something more than breach of contract.

Here, Harris entered into the contract with the Praags on May 3. The Praags delayed in making any down payment to Harris until funds cleared their account on May

15. (R. 191:10-11, 14-15, Exhibit 1.) The state failed to present any evidence of criminal intent or knowledge on Harris' part where the initial contract was concerned. That is, there is no evidence to support that Harris made a false or untrue statement in order to affect the judgment of the Praags in entering into the contract or making the down payment. See Utah Code Ann. § 76-6-401(5).

Thereafter, the Praags became concerned with Harris' ability to perform on the contract. On or about May 17, Mrs. Praag contacted him and expressed her concern. Harris told Mrs. Praag that he had started the work on the cabinets. (R. 191:4-5.) Mrs. Praag testified that Harris's statements did not address her concerns. (R. 191:5.) She was skeptical about his ability to perform the work. (R. 191:5.) On July 13, Mrs. Praag confronted Harris again. This time, he admitted "he actually really hadn't started our cabinets." (R. 191:6.) Also, he told Mrs. Praag, "I've spent the money." (R. 191:6.)

On July 14, the Praags terminated the contract. The work on the contract was not completed by July 21 (see R. 191:3-4 (Mrs. Praag testified that Harris failed to complete the work by July 21)) because the Praags canceled the contract prior to the due date. (R. 191:7-8.) The Praags' conduct affected the transaction and released Harris from performing as scheduled.

Those facts do not support that Harris was deceptive. There is no evidence that Harris entered into the contract or accepted the money promising to perform when he did not intend to perform; there is no evidence that he provided a false impression that

affected the Praags' judgment in entering the contract; and there is no evidence that Harris promised performance with criminal intent. In this case, the state simply demonstrated that Harris "fail[ed] to perform the promise in issue." Utah Code Ann. § 76-6-401(5)(e).

Indeed, even if this Court were to find that Harris' statement to Mrs. Praag on or about May 17 misrepresented the situation about the cabinets (R. 191:4-6 (Mrs. Praag testified that Harris told her on about May 17 that he had started the cabinets; then he told her on July 13 that "he actually really hadn't started our cabinets")), Mrs. Praag admitted that Harris' statements did not alleviate her concerns. She felt he "basically blew it off." (R. 191:5.) Thus, the state cannot show that the alleged misrepresentation somehow "affect[ed] the judgment" of the Praags in the matter. See Utah Code Ann. §§ 76-6-401(5)(a) and 76-6-405(2). Also, as Mrs. Praag admitted, on July 13, Harris "correct[ed]" any false impression that Mrs. Praag may have had about his work on the project. He told her he had not started the project. (R. 191:6); Utah Code Ann. § 76-6-401(5)(b).[2]

---

2 In the event the state's evidence also established that Harris made misrepresentations to the officer in October about his work on the cabinets, those misrepresentations are irrelevant, since the Praags did not rely on them in this case and the statements did not affect the Praags' judgment in the matter. See Utah Code Ann. § 76-6-401(5) (for "deception" to be criminal, it must "affect the judgment" of the other party to the transaction); see also id. at § 76-6-405(2) (recognizing that a falsity that has no pecuniary significance does not constitute "deception"). At the time Harris made the representation, the Praags had already terminated the original contract prior to the performance date.

In the end, the state failed to present "other evidence" to support deceptive "intent or knowledge" as required under the specific variation of theft by deception. See Utah Code Ann. § 76-6-401(5)(e). Under Utah law, a simple breach of performance will not support criminal conduct. Id.

In analogous cases, other courts have found that breach of contract does not give rise to criminal conduct. In State v. Amanns, 2 S.W. 3d 241 (Tenn. Crim. App. 1999), defendant was convicted of theft for failing to relinquish a down payment on a construction contract after the homeowner terminated the contract with defendant. The court described the facts as follows:

> The material facts of this case are not in dispute. In early July, 1994, the appellant, a contractor, entered into a written contract with Ms. Otey Sue Reynolds to remodel the basement of her home. The agreed contract price was $16,000. The terms provided that the appellant would be paid an initial amount of $6,000, a second payment after the project was fifty percent complete, and the balance due upon completion. On July 21, 1994, Ms. Reynolds paid the appellant $6,000 by check. The following day, the appellant cashed the $6,000 check. On this same day, he deposited the sum of $1,760.57 with 84 Lumber Company in Knoxville for the purchase of estimated materials to be used in the remodeling project. The appellant advised 84 Lumber that these materials were being purchased for improvements to Ms. Reynolds' house. The proof established that the appellant was under no contractual obligation to establish any such account. Moreover, Ms. Reynolds had no possessory interest in the funds in the account.
>
> The appellant began work on August 1, 1994. The first day involved only the unloading of some materials. The following day, he returned to Ms. Reynolds' home around 10:00 a.m. and worked until 3:50 p.m. for a period of approximately six hours. Upon the appellant's arrival at the Reynolds home the third day, Ms. Reynolds was obviously displeased with the quality of workmanship and advised the appellant, "I can't have work like this in my house." The appellant testified that he was told by Ms. Reynolds, "I don't like your work at all. I don't want you to work here no more." Following the exchange, the appellant loaded his tools

> and materials and left. No further work was performed. Ms. Reynolds testified that she attempted to contact the appellant by phone that day by leaving a message on his recorder. Within the next two days, Ms. Reynolds called her attorney about the matter. Approximately two days later, the appellant received a letter from Ms. Reynolds' attorney advising him that he was to have no further contact with Ms. Reynolds. At the appellant's request on August 5, 1994, 84 Lumber issued a check in the sum of $1,494.50, representing the balance of his deposit for the Reynolds job.

Amanns, 2 S.W.3d at 242-43. The appellant/defendant did not refund the money to the homeowner. Id.

After a trial, the defendant was convicted of general theft. Id. at 242. He appealed from the conviction. The Tennessee Court of Criminal Appeals ruled that the facts could not support the conviction. "It is undisputed that the appellant lawfully obtained possession of the $6,000 at which time Ms. Reynolds relinquished all of her interest in the money. Moreover, the record is void of any proof that the appellant took possession of the $6,000 with the intent to convert the money to his own use." Id. at 245. While the defendant failed to return a portion of the down payment, "these facts establish a breach of contract, they fall far short of establishing, beyond a reasonable doubt, any intent to defraud." Id.

Also, in Cox v. State, 658 S.W.2d 668 (Tex. Ct. App. 1983), the defendant was convicted of theft for breach of contract on a kitchen remodel. The appellate court reversed the conviction. Id.

The facts in Cox reflected the following: Complainant purchased a house which needed repairs. Defendant did some of the repairs and was paid. The complainant then

identified work in the kitchen that needed to be done, including the purchase and installation of a stove, oven, range top, and venting hood. Id. at 669-70. Appellant agreed to do the work for $600.00. After defendant was paid, he purchased the oven but did not connect it. Complainant also asked the defendant to install a sink she had purchased from Sears and to install countertops. Id. Defendant requested additional money for that project, which complainant paid. Defendant also offered to pick the sink up from Sears, and complainant gave him the receipt for it. Although defendant promised to do the work that evening, he did not return for two days. Id.

When complainant ultimately confronted defendant later, he had the sink and promised to do the work. Again he failed to do so. Id. at 670. For several days thereafter, complainant was unable to reach the defendant. When she finally was able to talk to him, he refused to explain why he would not finish the job, deliver the appliances or return the money. The defendant never reimbursed complainant and he was ultimately charged and convicted of theft. Id. at 669-70.

On appeal, the court ruled that the state's evidence failed to establish a false representation, and that the case "established no more than a dispute over appellant's performance of a kitchen remodeling contract." Id. at 671. "The mere fact that one fails to return or pay back money after failing to perform a contract, for the performance of which the money was paid in advance, does not constitute theft." Id.

In this case, there is no way to know to what extent Harris was able to perform on

the contract by July 21, since the Praags terminated the contract with Harris before that date. Also, according to the evidence, on the day the Praags entered into the contract with Harris, they specifically acknowledged the possibility that he would not be able to perform by July 21. The Praags signed the contract, which included a "$50 late penalty after [July] 21" if Harris was late on the project and it delayed closing on the Praags' home. (R. 191:14-15, Exhibit 1; 61-62.) The Praags' recognized at the time of the contract that performance may be late. Thereafter, the Praags canceled the contract before Harris was required to perform.

Under the law, the Praags may have a civil claim against Harris for breach of contract or unjust enrichment. Indeed, under Utah law, a civil claim for unjust enrichment requires proof of three factors:

> First, there must be a benefit conferred on one person by another. [See Berrett v. Stevens, 690 P.2d 553, 557 (Utah 1984).] Second, the conferee must appreciate or have knowledge of the benefit. See id. Finally, there must be "the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value." Id. The plaintiff must prove all three elements to sustain a claim of unjust enrichment.

Desert Mariah, Inc. v. B & L Auto, Inc., 2000 UT 83, ¶13, 12 P.3d 580. The claims in Harris' case may be more properly pursued in civil court.

Without additional evidence, the state is unable to establish unauthorized control for a general theft charge. The undisputed facts support that the Praags authorized the down payment to Harris, and they did not place any limitations on his use of the money.

In addition, the state's evidence fails to support deception. The evidence fails to establish that Harris made any misrepresentation to the Praags in connection with entering into the contract or making the down payment. There is no "other evidence of intent or knowledge" for deception as required by statute. See Utah Code Ann. § 76-6-401(5)(e).[3] On that basis, the Motion to Quash should have been granted.

3. The State Is Precluded From Arguing Any Other Theory for Theft Here, Since Any Other Alternative Theory Has Not Been Presented Below Through the Proper Channels. Also, Alternative Theories Would Implicate the Law Set Forth in *Bush*.

The state did not indicate in the court below that it intended to pursue any other theory of theft against Harris. (See record generally.) In the event the state intended to proceed with an alternative specific theory it was required to file a request to amend the information. See Bush, 2001 UT App 10. Since the state did not file such a request below, it is not necessary at this juncture for the parties to demonstrate whether the evidence supports any other specific theory of theft. Indeed, any other alternative theory should be pursued through the proper channels in the lower court. If the state is able to present any other theory, even on the record as it exists, Harris may be entitled to cross-examine the witnesses anew in light of the amended charge. See Bush, 2001 UT App 10,

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3 In the event the state tries to claim that the criminal conduct occurred when Harris signed the July 14 letter requiring him to repay the down payment, that conduct likewise does not rise to a criminal level. The letter essentially acknowledges that the Praags initially relinquished control of the $7,000 to Harris, and they demanded that Harris repay the money. The Praags had the letter drawn up by their attorney and it included their language. There is no evidence that Harris made any representations to support a claim of "deception" there.

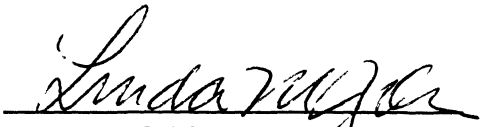
¶¶27-29; supra, subpoint C.1., herein.

Indeed, it is not necessary for this Court to determine sufficiency of the evidence for the bindover. The question here is whether the trial court had a complete record of the preliminary hearing to decide the Motion to Quash. The trial court was not at liberty to disregard the "Stipulated Facts," and order an additional evidentiary hearing to supplement the preliminary hearing, where the state would be entitled to present whatever evidence it wished. The law does not permit such proceedings. This Court should reverse the trial court's order in that regard.

CONCLUSION

For the reasons set forth herein, Harris respectfully requests that this Court enter an order vacating that portion of the trial court's January 16 order providing for further evidentiary proceedings. Also, Harris respectfully requests that this Court direct the trial court to rule on the Motion to Quash based on the transcript of the existing preliminary hearing and the "Stipulated Facts."

SUBMITTED this 4th day of September, 2002.



LINDA M. JONES
STEPHEN HOWARD
SALT LAKE LEGAL DEFENDER ASSOC.
Counsel for the Appellant/Defendant

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, 140230, Salt Lake City, Utah 84114-0230 and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, this 9th day of September, 2002.

LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals as indicated above this __ day of _____, 2002.

_____

ADDENDA

ADDENDUM A

DAVID E. YOCOM
District Attorney for Salt Lake County
ANNE A. CAMERON, 8865
Deputy District Attorney
2001 South State Street, S3700
Salt Lake City, Utah 84190
Telephone: (801) 468-3422

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- JEFF RAY HARRIS, Defendant.	ORDER Case No. 001919065 Hon. Leslie A. Lewis

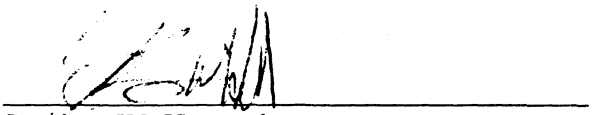
Defendant's argument on the defendant's Motion to Quash the Bindover was heard on November 28, 2001. The transcript of the Preliminary Hearing was provided, however, it is incomplete due to technical difficulties during the hearing. The State and the defendant have stipulated to the testimony which was absent from the transcript, and provided that stipulation to the Court. The Court is not satisfied that the evidence presented supports the bindover, and will hear the live testimony which was not recorded in the transcript, along with any other live testimony the State would like to present. The Court will rely on the live testimony presented and the transcript from the Preliminary Hearing. The case will not be remanded to Judge Lindberg.

DATED this 11th day of ~~December, 2001.~~ 15th ... 2002

BY THE COURT:

LESLIE A. LEWIS, District Judge

Approved as to form:



Stephen W. Howard

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing Order was delivered to Stephen W. Howard, Attorney for Defendant Jeff Ray Harris, at 424 East 500 South, Suite 300, Salt Lake City, Utah 84111 on the ____ day of December, 2001.

_____

ADDENDUM B

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah, Respondent, v. Jeff Ray Harris Petitioner.	)	ORDER Case No. 20020085-CA

Before Judges Jackson, Bench, and Orme.

This matter is before the court on a petition for permission to appeal from an interlocutory order filed pursuant to Rule 5 of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the petition for permission to appeal is granted.

DATED this 24th day of April, 2002.

FOR THE COURT:

Gregory K. Orme, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 29th day of April, 2002, a true and correct copy of the attached Order was deposited in the United States mail to:

J. FREDERIC VOROS, JR.
ASSISTANT ATTORNEY GENERAL
160 E 300 S 6TH FL
PO BOX 140854
SALT LAKE CITY UT 84114-0854

STEPHEN W. HOWARD
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 E 500 S STE 300
SALT LAKE CITY UT 84111

and a true and correct copy of the attached ORDER was deposited in the United States mail to the judge listed below:

HONORABLE LESLIE A. LEWIS
THIRD DISTRICT, SALT LAKE
450 S STATE ST
PO BOX 1860
SALT LAKE CITY UT 84114-1860

Judicial Secretary

TRIAL COURT: THIRD DISTRICT, SALT LAKE, 001919065
APPEALS CASE NO.: 20020085-CA

ADDENDUM C

Rule 7. Proceedings before magistrate.

(a) When a summons is issued in lieu of a warrant of arrest, the defendant shall appear before the court as directed in the summons.

(b) When any peace officer or other person makes an arrest with or without a warrant, the person arrested shall be taken to the nearest available magistrate for setting of bail. If an information has not been filed, one shall be filed without delay before the magistrate having jurisdiction over the offense.

(c)(1) If a person is arrested in a county other than where the offense was committed the person arrested shall without unnecessary delay be returned to the county where the crime was committed and shall be taken before the proper magistrate under these rules.

(2) If for any reason the person arrested cannot be promptly returned to the county and the charge against the defendant is a misdemeanor for which a voluntary forfeiture of bail may be entered as a conviction under Subsection 77-7-21(1), the person arrested may state in writing a desire to forfeit bail, waive trial in the district in which the information is pending, and consent to disposition of the case in the county in which the person was arrested, is held, or is present.

(3) Upon receipt of the defendant's statement, the clerk of the court in which the information is pending shall transmit the papers in the proceeding or copies of them to the clerk of the court for the county in which the defendant is arrested, held, or present. The prosecution shall continue in that county.

(4) Forfeited bail shall be returned to the jurisdiction that issued the warrant.

(5) If the defendant is charged with an offense other than a misdemeanor for which a voluntary forfeiture of bail may be entered as a conviction under Subsection 77-7-21(1), the defendant shall be taken without unnecessary delay before a magistrate within the county of arrest for the determination of bail under Section 77-20-1 and released on bail or held without bail under Section 77-20-1.

(6) Bail shall be returned to the magistrate having jurisdiction over the offense, with the record made of the proceedings before the magistrate.

(d) The magistrate having jurisdiction over the offense charged shall, upon the defendant's first appearance, inform the defendant:

(1) of the charge in the information or indictment and furnish a copy;

(2) of any affidavit or recorded testimony given in support of the information and how to obtain them;

(3) of the right to retain counsel or have counsel appointed by the court without expense if unable to obtain counsel;

(4) of rights concerning pretrial release, including bail; and

(5) that the defendant is not required to make any statement, and that the statements the defendant does make may be used against the defendant in a court of law.

(e) The magistrate shall, after providing the information under paragraph (d) and before proceeding further, allow the defendant reasonable time and opportunity to consult counsel and shall allow the defendant to contact any attorney by any reasonable means, without delay and without fee.

(f) If the charge against the defendant is a misdemeanor, the magistrate shall call upon the defendant to enter a plea.

(1) If the plea is guilty, the defendant shall be sentenced by the magistrate as provided by law.

(2) If the plea is not guilty, a trial date shall be set. The date may not be extended except for good cause shown. Trial shall be held under these rules and law applicable to criminal cases

(g)(1) If a defendant is charged with a felony, the defendant shall be advised of the right to a preliminary examination. If the defendant waives the right to a preliminary examination, and the prosecuting attorney consents, the magistrate shall order the defendant bound over to answer in the district court.

(2) If the defendant does not waive a preliminary examination, the magistrate shall schedule the preliminary examination. The examination shall be held within a reasonable time, but not later than ten days if the defendant is in custody for the offense charged and not later than 30 days if the defendant is not in custody. These time periods may be extended by the magistrate for good cause shown. A preliminary examination may not be held if the defendant is indicted.

(h)(1) Unless otherwise provided, a preliminary examination shall be held under the rules and laws applicable to criminal cases tried before a court. The state has the burden of proof and shall proceed first with its case. At the conclusion of the state's case, the defendant may testify under oath, call witnesses, and present evidence. The defendant may also cross-examine adverse witnesses.

(2) If from the evidence a magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate shall order, in writing, that the defendant be bound over to answer in the district court. The findings of probable cause may be based on hearsay in whole or in part. Objections to evidence on the ground that it was acquired by unlawful means are not properly raised at the preliminary examination.

(3) If the magistrate does not find probable cause to believe that the crime charged has been committed or that the defendant committed it, the magistrate shall dismiss the information and discharge the defendant. The magistrate may enter findings of fact, conclusions of law, and an order of dismissal. The dismissal and discharge do not preclude the state from instituting a subsequent prosecution for the same offense.

(i) At a preliminary examination, the magistrate, upon request of either party, may exclude witnesses from the courtroom and may require witnesses not to converse with each other until the preliminary examination is concluded. On the request of either party, the magistrate may order all spectators to be excluded from the courtroom.

(j)(1) If the magistrate orders the defendant bound over to the district court, the magistrate shall execute in writing a bind-over order and shall transmit to the clerk of the district court all pleadings in and records made of the proceedings before the magistrate, including exhibits, recordings, and any typewritten transcript.

(2) When a magistrate commits a defendant to the custody of the sheriff, the magistrate shall execute the appropriate commitment order.

(k)(1) When a magistrate has good cause to believe that any material witness in a pending case will not appear and testify unless bond is required, the magistrate may fix a bond with or without sureties and in a sum considered adequate for the appearance of the witness.

(2) If the witness fails or refuses to post the bond with the clerk of the court, the magistrate may commit the witness to jail until the witness complies or is otherwise legally discharged.

(3) If the witness does provide bond when required, the witness may be examined and cross-examined before the magistrate in the presence of the defendant and the testimony shall be recorded. The witness shall then be discharged.

(4) If the witness is unavailable or fails to appear at any subsequent hearing or trial when ordered to do so, the recorded testimony may be used at the hearing or trial in lieu of the personal testimony of the witness.

(Amended effective May 1, 1993; November 1, 1996; April 29, 1998; April 1, 1999.)

76-6-401. Definitions.

For the purposes of this part:

(1) "Property" means anything of value, including real estate, tangible and intangible personal property, captured or domestic animals and birds, written instruments or other writings representing or embodying rights concerning real or personal property, labor, services, or otherwise containing anything of value to the owner, commodities of a public utility nature such as telecommunications, gas, electricity, steam, or water, and trade secrets, meaning the whole or any portion of any scientific or technical information, design, process, procedure, formula or invention which the owner thereof intends to be available only to persons selected by him.

(2) "Obtain" means, in relation to property, to bring about a transfer of possession or of some other legally recognized interest in property, whether to the obtainer or another; in relation to labor or services, to secure performance thereof; and in relation to a trade secret, to make any facsimile, replica, photograph, or other reproduction.

(3) "Purpose to deprive" means to have the conscious object:

(a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or

(b) To restore the property only upon payment of a reward or other compensation; or

(c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.

(4) "Obtain or exercise unauthorized control" means, but is not necessarily limited to, conduct heretofore defined or known as common-law larceny by trespassory taking, larceny by conversion, larceny by bailee, and embezzlement.

(5) "Deception" occurs when a person intentionally:

(a) Creates or confirms by words or conduct an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction; or

(b) Fails to correct a false impression of law or fact that the actor previously created or confirmed by words or conduct that is likely to affect the judgment of another and that the actor does not now believe to be true; or

(c) Prevents another from acquiring information likely to affect his judgment in the transaction; or

(d) Sells or otherwise transfers or encumbers property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment is or is not valid or is or is not a matter of official record; or

(e) Promises performance that is likely to affect the judgment of another in the transaction, which performance the actor does not intend to perform or knows will not be performed; provided, however, that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.

76-6-403. Theft — Evidence to support accusation.

Conduct denominated theft in this part constitutes a single offense embracing the separate offenses such as those heretofore known as larceny, larceny by trick, larceny by bailees, embezzlement, false pretense, extortion, blackmail, receiving stolen property. An accusation of theft may be supported by evidence that it was committed in any manner specified in Sections 76-6-404 through 76-6-410, subject to the power of the court to ensure a fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

76-6-404. Theft — Elements.

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

76-6-405. Theft by deception.

(1) A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof.

(2) Theft by deception does not occur, however, when there is only falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares or worth in communications addressed to the public or to a class or group.